

3

**LUFKIN CREOSOTING COMPANY, INC.**

P.O. BOX 1207 • Phones: OFFICE (936) 634-4923 • PLANT (936) 634-4552

FAX: (936) 634-2100

LUFKIN, TEXAS 75902-1207

Please Remit To:
P.O. Box 4424
Department 01
Houston, TX 77210**Invoice**

000000078990

INVOICE NUMBER

43672

BILL TO: Georgia Southwestern Railroad, Inc.
Attn: Accounts Payable
78 Pulpwood Road
DAWSON, GA 39842SHIP TO: GSWR % Lindsey Construction
Job Site
333 Broad Street
Eufaula, AL

DATE	ORDER	SALESMAN	ORDER DATE	PURCHASE ORDER	SPECIAL INSTRUCTIONS
10/03/05	23568	HQU	09/02/05	511861	732805, 732818

QUANTITY	U/M	DESCRIPTION	CODE	PRICE	EXTENSION
41		Lumber Creosote 9x10 10 Ft.	40910	101.25	4,151.25
25		Lumber Creosote 8x16 26 Ft.	40816	514.13	12,853.25
45		Lumber Creosote 3"x10"X 20 Ft.	40310	67.50	3,037.50
29		Lumber Creosote 5"x8"X 18 Ft.	40508	72.00	2,088.00
10		Lumber Creosote 6"x14"x 26 Ft.	40614	336.70	3,367.00
2		Freight Charges	55550	1,324.00	2,648.00

Treated with No. 1
Creosote, Thanks
for your Business

PAYMENT / TERMS

Net 30

SUBTOTAL :
TAX :28,145.00
.00

EXHIBIT

3

Georgia Southwestern Railroad, Inc.

Lufkin Creosoting Company, Inc.

Date	Type	Reference	Original Amt.	Balance Due	1/20/2006 Discount	9642 Payment
10/03/2005	Bill	Inv #43672	28,145.00	28,145.00		28,145.00
					Check Amount	28,145.00

PAYMENT
RECORD

First National Bank of So Inv #43672

28,145.00

Lindsey Contractors, Inc.

4660 M. J. Taylor Road
Adel, Ga. 31620**Invoice**

DATE	INVOICE #
2/13/2006	4638

BILL TO
Georgia Southwestern Railroad, Inc. C/O Terry Small 78 Pulpwood Road Dawson, GA 39842

NATURE OF SERVICES
January 2006 Repairs on trestle @ MP 338.8 White Oak

DESCRIPTION	SERVICE CONT...	VENDOR	LOCATION
	SC0554	00777A0	MP 338.8
DESCRIPTION	HRS	RATE	AMOUNT
Remove structure damage by fire; ties, guard rail, stringers and hardware		3,500.00	3,500.00
Install ties		4,000.00	4,000.00
Install guard rail		3,420.00	3,420.00
Install stringers		27,000.00	27,000.00
Replace bracing		12,000.00	12,000.00
Replace post		5,400.00	5,400.00
Hardware (brace bolts and stringer core bolts)		3,000.00	3,000.00

Phone #	Fax #
229-794-3762	229-794-9308

Total

\$58,320.00

GEORGIA SOUTHWESTERN RAILROAD, INC.

Lindsey Contractors, Inc.

Invoice # 4638 Repairs on trestle MP 338.8

7/20/2006

1624
58,320.00

Wachovia Checking

58,320.00

LMP12 M/P CHECK

51N315 (10/05) 526882

DEPOSITION OF AMERICUS MITCHELL

September 22, 2006

Pages 1 through 59

**CONDENSED TRANSCRIPT AND CONCORDANCE
PREPARED BY:**

Haislip, Ragan, Green, Starkie & Watson, P.C.

566 South Perry Street

Post Office Box 62

Montgomery, AL 36104

Phone: (334) 263-4455

Fax: (334) 263-9167

E-mail: haislipragan@charter.net

Page 17	Page 19
<p>1 10-foot harrow that I own, and it's just a</p> <p>2 matter of harrowing the fire breaks.</p> <p>3 Q. You mentioned that your fire breaks can be</p> <p>4 natural fire breaks, roadbeds or prepared fire</p> <p>5 breaks that you're talking about that you go</p> <p>6 through with your harrow.</p> <p>7 A. Yes.</p> <p>8 Q. How many natural fire breaks were there on</p> <p>9 this particular tract?</p> <p>10 A. It was natural fire breaks on the north and</p> <p>11 the east and the south and part of the west.</p> <p>12 Q. So this tract was nearly surrounded by natural</p> <p>13 fire breaks then?</p> <p>14 A. Yes.</p> <p>15 Q. Can you explain to me exactly what those</p> <p>16 natural fire breaks were?</p> <p>17 A. Natural fire breaks was a road on the north.</p> <p>18 Q. Let me ask you specifically about that road.</p> <p>19 Is that a county-maintained road or is it just</p> <p>20 one of your internal roads?</p> <p>21 A. It was at one time a county-maintained road.</p> <p>22 And it was since abandoned, and I maintain it</p> <p>23 now, what part of it that's left that's in my</p>	<p>1 A. In years past there was no need to worry about</p> <p>2 the railroad because it was maintained. The</p> <p>3 railroad is sufficiently dressed with crushed</p> <p>4 rock, and it actually could be used as a fire</p> <p>5 break itself, the railroad. But, of course,</p> <p>6 the railroad went through it so we burned on</p> <p>7 both sides of the railroad.</p> <p>8 Q. But my question to you is, did you maintain</p> <p>9 fire breaks adjacent to the railroad or did</p> <p>10 you just use the gravel on the railroad as a</p> <p>11 natural fire break?</p> <p>12 A. I did not have any fire breaks on the</p> <p>13 railroad.</p> <p>14 Q. I want to ask you about your -- When I asked</p> <p>15 y'all for some discovery request, Craig gave</p> <p>16 me a copy of the burn permit that you</p> <p>17 obtained. Who did you have to obtain the burn</p> <p>18 permit from?</p> <p>19 A. They have an 800 number that you call, and</p> <p>20 I've got it somewhere in my records.</p> <p>21 (Plaintiff's Exhibit 1 marked for</p> <p>22 identification.)</p> <p>23 Q. Mr. Mitchell, I'm going to show you a copy of</p>
Page 18	Page 20
<p>1 property.</p> <p>2 Q. And that was the north side?</p> <p>3 A. Yes.</p> <p>4 Q. What about the east and the west?</p> <p>5 A. The east side is a natural stream, 6 or 8</p> <p>6 foot, unless it's in flood level, which would</p> <p>7 be 20 feet, you know, and then a tributary to</p> <p>8 Lake Eufaula on the south and a partial stream</p> <p>9 on the west and my harrowed fire break to</p> <p>10 balance on the rest.</p> <p>11 Q. Which side does the railroad border on this</p> <p>12 particular tract?</p> <p>13 A. The railroad runs east and west across the</p> <p>14 southern portion of this particular tract.</p> <p>15 Q. And a portion of that you mention on the</p> <p>16 southern portion is a stream that you're using</p> <p>17 as a natural fire break; is that correct?</p> <p>18 A. Yes.</p> <p>19 Q. Did you maintain fire breaks adjacent to the</p> <p>20 railroad?</p> <p>21 A. No.</p> <p>22 Q. Did you use the railroad as a fire break, the</p> <p>23 rocks and things along the railroad?</p>	<p>1 this document here. Since you stated that you</p> <p>2 called, I'm not sure if you've ever seen it</p> <p>3 before.</p> <p>4 MR. ALLRED: I'm sorry to interrupt</p> <p>5 you, but that was generated off</p> <p>6 of a state database at the</p> <p>7 Forestry Commission and that's</p> <p>8 how I got that document. He</p> <p>9 never was provided with a written</p> <p>10 copy of the permit in this</p> <p>11 instance.</p> <p>12 MR. JOHNSON: That's fine. I just</p> <p>13 wanted to get Mr. Mitchell to</p> <p>14 take a look at it.</p> <p>15 Q. Mr. Mitchell, you stated earlier you've been</p> <p>16 conducting prescribed burns on your property</p> <p>17 for several years; is that correct?</p> <p>18 A. Yes.</p> <p>19 Q. And every time you conduct a prescribed burn,</p> <p>20 is it your practice to obtain a burn permit?</p> <p>21 A. Yes. You have to.</p> <p>22 Q. And that's pursuant to the Alabama Forestry</p> <p>23 Commission's regulations?</p>

<p style="text-align: right;">Page 21</p> <p>1 A. Yes.</p> <p>2 Q. And to your knowledge -- I understand your</p> <p>3 attorney has just informed me that this was a</p> <p>4 computer printout, but to your knowledge was</p> <p>5 this the burn permit or a computer printout of</p> <p>6 the burn permit you obtained prior to this</p> <p>7 burn in February of 2005?</p> <p>8 A. As far as I can concern (sic), but it's got</p> <p>9 acres, one, and that's in error.</p> <p>10 Q. But the date here is -- date of burn is</p> <p>11 February 12, 2005, and that would be correct?</p> <p>12 A. As far as I know, that's correct.</p> <p>13 Q. Yes, sir.</p> <p>14 Did you contact the Forestry Commission</p> <p>15 yourself to obtain the burn permit?</p> <p>16 A. Yes.</p> <p>17 Q. And you obtained that through the local</p> <p>18 division here in Barbour County --</p> <p>19 A. No.</p> <p>20 Q. -- or is it through the state?</p> <p>21 A. No. Called them up long distance. They've</p> <p>22 got an 800 number.</p> <p>23 Q. So you called somebody in Montgomery or --</p>	<p style="text-align: right;">Page 23</p> <p>1 A. No.</p> <p>2 Q. Did they ask you about the firing technique</p> <p>3 that you were going to use in conducting the</p> <p>4 prescribed burn?</p> <p>5 A. They asked me what the purpose of the burn was</p> <p>6 for, and I told them fuel reduction.</p> <p>7 Q. Did you have to inform them or did they ask</p> <p>8 you about any other areas adjacent to the area</p> <p>9 that you were going to be involved in the</p> <p>10 prescribed burn that could be adversely</p> <p>11 impacted by smoke or by fire?</p> <p>12 A. No.</p> <p>13 Q. Did they ask you about any other special</p> <p>14 precautions that were going to be taken?</p> <p>15 A. On occasion they ask me if it's next to a road</p> <p>16 where smoke might interfere. And, of course,</p> <p>17 this is on the back side of the place, and we</p> <p>18 don't have any that would affect the road --</p> <p>19 any land that would affect the road.</p> <p>20 Q. You mentioned that you have a registered</p> <p>21 forester that came down and laid out your fire</p> <p>22 breaks for you.</p> <p>23 A. Yes.</p>
<p style="text-align: right;">Page 22</p> <p>1 A. I thought they used to answer in Troy, but I</p> <p>2 think they answer now in Montgomery. Wherever</p> <p>3 that 800 number takes me, that's who I talked</p> <p>4 with.</p> <p>5 Q. And so long as there's not -- the fire</p> <p>6 marshal hasn't said there's a burn alert or</p> <p>7 anything like that, there's usually not any</p> <p>8 problem obtaining a burn permit, is there, for</p> <p>9 you?</p> <p>10 A. No problem.</p> <p>11 Q. What type of information did you give them</p> <p>12 when you requested the burn permit?</p> <p>13 A. I gave them the approximate acreage, but it</p> <p>14 was more than one.</p> <p>15 Q. When you did that, did you give them any</p> <p>16 additional information?</p> <p>17 A. I gave them whatever they asked for.</p> <p>18 Q. Let me ask you a couple of questions about</p> <p>19 things they may have asked for when you were</p> <p>20 obtaining the burn permit.</p> <p>21 Did they ask you about the manpower or</p> <p>22 equipment you were going to use in conducting</p> <p>23 the prescribed burn?</p>	<p style="text-align: right;">Page 24</p> <p>1 Q. Did Mr. Moore formulate a prescribed burn plan</p> <p>2 for you?</p> <p>3 A. Well, he leaves that judgment up to me. I can</p> <p>4 tell when the fuel begins to burn up. We</p> <p>5 generally try to burn every two to three</p> <p>6 years, and sometimes we don't get around to</p> <p>7 doing that. But in this particular area, it</p> <p>8 just happened on that -- that was ready for a</p> <p>9 burn. And I applied for a permit and got a</p> <p>10 permit and burned it.</p> <p>11 Q. But my question was, Mr. Moore didn't give you</p> <p>12 a written prescribed burn plan before you did</p> <p>13 this particular controlled burn?</p> <p>14 A. No.</p> <p>15 Q. Has Mr. Moore ever given you a written</p> <p>16 prescribed burn plan that he signed and was</p> <p>17 notarized?</p> <p>18 A. No.</p> <p>19 Q. Mr. Mitchell, you've been doing your</p> <p>20 prescribed burns on your place for several</p> <p>21 years as we've mentioned. Have you ever had</p> <p>22 anybody that had a prescribed burn</p> <p>23 certification present while you were doing</p>

Page 25	Page 27
<p>1 your prescribed burns? Let me back up.</p> <p>2 Have you ever heard the term "prescribed</p> <p>3 burn certification"?</p> <p>4 A. No.</p> <p>5 Q. Are you aware that the State of Alabama and</p> <p>6 the Forestry Commission requires somebody with</p> <p>7 a prescribed burn certification be present</p> <p>8 when prescribed burns are being conducted?</p> <p>9 A. I was not aware of it. We never have used it.</p> <p>10 Q. Yes, sir.</p> <p>11 Have you or anybody -- say, any of your</p> <p>12 grandsons or your sons, anybody that's ever</p> <p>13 been helping you out here, ever gone through</p> <p>14 any training to your knowledge to become</p> <p>15 prescribed burn certified?</p> <p>16 A. Any formal training? When it comes to</p> <p>17 prescribed burns, your best ally you have is</p> <p>18 experience in doing it before. And most of my</p> <p>19 sons and grandsons have all helped me in the</p> <p>20 past in my prescribed burns.</p> <p>21 Q. How long before you did this prescribed burn</p> <p>22 in February did you take your tractor over</p> <p>23 there and your harrow and prepare your fire</p>	<p>1 it dry enough to burn in February when you</p> <p>2 conducted the prescribed burn?</p> <p>3 A. Yes.</p> <p>4 Q. Had you had an adequate amount of rainfall</p> <p>5 during the month of January and February so it</p> <p>6 wasn't overly dry?</p> <p>7 A. That's right.</p> <p>8 Q. And do you recall -- Let me say this. What</p> <p>9 type of wind conditions are optimal for</p> <p>10 conducting a prescribed burn?</p> <p>11 A. Preferably something less than 10 miles an</p> <p>12 hour.</p> <p>13 Q. Do you recall what the approximate wind speeds</p> <p>14 were for that time --</p> <p>15 A. I have no idea.</p> <p>16 Q. Do you recall specifically what the wind</p> <p>17 speeds were like that day?</p> <p>18 A. It was calm.</p> <p>19 Q. Do you remember there being any gusts of wind</p> <p>20 or anything like that during the day or was it</p> <p>21 calm throughout the day as far as you can</p> <p>22 recall?</p> <p>23 A. It was a calm day as far as -- that I could</p>
Page 26	Page 28
<p>1 breaks?</p> <p>2 A. Oh, within the last -- within -- I would say</p> <p>3 we watch the weather. And if you get the</p> <p>4 lanes plowed within a matter of a week, that's</p> <p>5 what we try to do. And that's what I did on</p> <p>6 this particular burn.</p> <p>7 Q. What do you look for weather-wise when you're</p> <p>8 thinking about doing a prescribed burn? What</p> <p>9 type of conditions do you look for?</p> <p>10 A. Well, the first thing you want to look for is</p> <p>11 is it dry enough to burn. And if it's dry</p> <p>12 enough to burn, you have to see about the</p> <p>13 wind. And then you have to see about help,</p> <p>14 and then you have to make sure that you do it</p> <p>15 early in the morning while dew is on the</p> <p>16 ground to get it started. And you burn the --</p> <p>17 light on the perimeters and burn to the center</p> <p>18 of the area. And you try to do that as early</p> <p>19 in the morning as you can, preferably nine or</p> <p>20 ten o'clock in the morning.</p> <p>21 Q. You mentioned that you look for the right</p> <p>22 amount of moisture. You want to make sure</p> <p>23 it's dry enough to burn. In your opinion, was</p>	<p>1 recall.</p> <p>2 Q. I'm going to ask you to take a look at these</p> <p>3 two printouts here. These are from the</p> <p>4 National Weather Service.</p> <p>5 MR. JOHNSON: I'm going to mark them</p> <p>6 collectively as Plaintiff's</p> <p>7 Exhibit 2.</p> <p>8 (Plaintiff's Exhibit 2 marked for</p> <p>9 identification.)</p> <p>10 Q. Unfortunately the National Weather Service</p> <p>11 must not think very highly of Eufaula because</p> <p>12 they don't have a weather station in Eufaula.</p> <p>13 The closest ones that they had were Troy and</p> <p>14 Montgomery. I suppose I probably could have</p> <p>15 looked at Columbus, Georgia, but I figured</p> <p>16 Troy was about as close as Columbus, Georgia.</p> <p>17 I'm going to ask you --</p> <p>18 A. Now, how in the name of Pete can you determine</p> <p>19 what the wind is doing in Eufaula from</p> <p>20 Columbus, Georgia?</p> <p>21 Q. I don't know. But we can kind of work on some</p> <p>22 averages, I think.</p> <p>23 I'm going to get you to take a look at</p>

Page 37	Page 39
<p>1 Q. I'm going to show you what I'm going to mark 2 for identification as Plaintiff's Exhibit 3. 3 This is the fire incident report from the 4 Eufaula Fire Department. 5 Have you ever seen these documents before? 6 A. No, I never have. 7 What do you want me to do with them? 8 Q. I just wanted to ask you to look at them, and 9 I'm going to ask you a couple of questions. 10 The dates and times that are referenced 11 indicates that the alarm was taken at 7:33 on 12 the 13th of February -- see the dates here? -- 13 and that they arrived about five minutes 14 after. That's pretty good response time for 15 getting them down in the woods, I think. 16 A. They came out there the day of the burn. If 17 the burn was on the 12th, they were out there 18 that afternoon. That might have been about 19 the right time. 20 Q. Now -- 21 A. But they stayed there all night. 22 Q. Did they get there in the afternoon? 23 A. Yeah.</p>	<p>1 You know, I'm not sure that 2 wasn't produced to me by you 3 initially. 4 MR. JOHNSON: I don't think so 5 because I don't think we've got a 6 copy of this one. I think this 7 is the only fire department 8 report we have. 9 Off the record. 10 (Brief off-the-record discussion.) 11 Q. Mr. Mitchell, Craig has just shown me that 12 there was a separate incident report filed for 13 the 12th so I've been asking you about the 14 dates. The fire department did arrive on the 15 12th apparently? 16 A. Uh-huh (positive response). 17 Q. And this report I marked for Number 3 would be 18 when they came back out the next morning? 19 A. Yes. 20 Q. Were you out there the next morning when the 21 fire department arrived? 22 A. I was not. 23 Q. It says that Ben Mitchell was there according</p>
Page 38	Page 40
<p>1 Q. Was it still daylight when the fire department 2 got there? 3 A. Yeah. Yeah. They got there late that 4 afternoon. 5 MR. ALLRED: If I could interject 6 for just a minute here, I have a 7 copy of a report here on the 12th 8 if you want to take a look at 9 that. 10 MR. JOHNSON: Did you produce this 11 in your discovery? 12 MR. ALLRED: I don't know. I 13 thought I did. 14 MR. JOHNSON: I know you didn't 15 because this is the first one 16 I've seen. This is the only fire 17 department report that we've 18 seen. 19 MR. ALLRED: Well, apparently I 20 didn't give you the 12th. 21 MR. JOHNSON: If you can send me a 22 copy of it, that will be fine. 23 MR. ALLRED: Sure.</p>	<p>1 to this. Is that your son? 2 A. That's my son. 3 Q. When y'all were out there on that afternoon, 4 do you recall if you or if anybody from the 5 fire department notified anybody from Georgia 6 Southwest Railroad? 7 A. Yes. They told me later on that they had 8 called the railroad. 9 Q. Before you conducted the prescribed burn, did 10 you ever contact anybody from the railroad to 11 tell them you were going to be conducting a 12 prescribed burn? 13 A. No. I never have. 14 Q. You've never contacted the railroad to notify 15 them that you were conducting a prescribed 16 burn? 17 A. Huh-uh (negative response). 18 Q. Do you own the railroad itself or does the 19 railroad own that property? 20 A. I don't own any railroad. 21 Q. That's my question to you. The land that it 22 sits on, that little right-of-way there -- 23 A. The right-of-way belongs -- it originally</p>

Deposition of Americus Mitchell

September 22, 2006

Page 45	Page 47
<p>1 adjacent to the railroad and adjacent to that</p> <p>2 trestle, do you think the railroad still would</p> <p>3 have caught fire?</p> <p>4 A. Probably not.</p> <p>5 Q. Do you know what that particular spur line</p> <p>6 services? Was there a old business -- an old</p> <p>7 industry or something on the end of that spur</p> <p>8 line?</p> <p>9 A. It was serving the Georgia Pacific Company,</p> <p>10 and how often I have no record of it. I</p> <p>11 couldn't attest to that.</p> <p>12 Q. But that business at this time, it was no</p> <p>13 longer in operation?</p> <p>14 A. No longer in operation.</p> <p>15 Q. To your knowledge was the railroad still using</p> <p>16 the line to run freight cars up and down to</p> <p>17 service that business?</p> <p>18 A. No.</p> <p>19 Q. To your knowledge was the railroad still using</p> <p>20 the line for other purposes?</p> <p>21 A. At one time they had, I would say, in excess</p> <p>22 of a hundred cars stored on that track.</p> <p>23 Q. Were they stored on both sides of this</p>	<p>1 several weeks I know.</p> <p>2 Q. Did you ever contact the folks at Georgia</p> <p>3 Southwestern Railroad about asking them to</p> <p>4 move some of the cars so y'all could get</p> <p>5 across the railroad?</p> <p>6 A. I did.</p> <p>7 Q. Do you recall when that may have been?</p> <p>8 A. No, I can't recall. But the cars that were</p> <p>9 stored blocked roads to property that we</p> <p>10 owned, and we couldn't get down to it.</p> <p>11 Q. Did the folks from the railroad come down and</p> <p>12 move the cars when you called them to open</p> <p>13 your road up?</p> <p>14 A. I called them and told them they had it</p> <p>15 blocked, and they opened gaps in the road</p> <p>16 where you could go in through it.</p> <p>17 Q. Yes, sir.</p> <p>18 After the fire and after the trestle was</p> <p>19 damaged, was the railroad still able to cross</p> <p>20 that bridge and put cars on the other side of</p> <p>21 that bridge?</p> <p>22 A. I don't know. Not to my knowledge.</p> <p>23 Q. Do you know if the bridge has been repaired</p>
Page 46	Page 48
<p>1 particular trestle that we're talking about</p> <p>2 here?</p> <p>3 A. Yes.</p> <p>4 Q. So there were cars on the other side of the</p> <p>5 trestle on the same side as the old industry</p> <p>6 down there?</p> <p>7 A. Yes.</p> <p>8 Q. How far is it to your knowledge or, if you</p> <p>9 know, from that trestle down there to where</p> <p>10 that old business is?</p> <p>11 A. Come again with that question.</p> <p>12 Q. Do you know how far it is, say even from your</p> <p>13 property down there, how long that line is to</p> <p>14 where it gets to the end of that spur line</p> <p>15 where that business is down there?</p> <p>16 A. Oh, from my property to the business?</p> <p>17 Q. Yes, sir.</p> <p>18 A. The business is in the outskirts of Clayton.</p> <p>19 I would say it would be at least 10 to 12</p> <p>20 miles down there to the business.</p> <p>21 Q. And you believe that prior to the fire they</p> <p>22 were storing cars on the length of that line?</p> <p>23 A. They were storing cars on that line for</p>	<p>1 since that time, if there's been any repairs</p> <p>2 undertaken on that particular bridge?</p> <p>3 A. There's been repairs undertaken. But as far</p> <p>4 as I know, it never has been completed.</p> <p>5 (Brief recess.)</p> <p>6 Q. (Continuing by Mr. Johnson) Mr. Mitchell, I've</p> <p>7 got a few more questions I want to ask you.</p> <p>8 Your counsel produced copies of some</p> <p>9 photographs here. I'm going to get you to</p> <p>10 take a look at these pictures and ask you a</p> <p>11 couple of questions about them.</p> <p>12 (Plaintiff's Exhibit 4 marked for</p> <p>13 identification.)</p> <p>14 Q. I'm going to mark these collectively as</p> <p>15 Plaintiff's Exhibit 4. There's a bunch of</p> <p>16 pictures in here.</p> <p>17 Do you know when those were taken?</p> <p>18 A. They were taken, oh, I would say, several</p> <p>19 weeks after the fire.</p> <p>20 Q. So you think they were taken at some point</p> <p>21 during maybe the latter part of February or</p> <p>22 first part of March?</p> <p>23 A. Yes, I would say so.</p>

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GEORGIA SOUTHWESTERN RAILROAD,)
INC., a Corporation.)
Plaintiff.)
vs.) CIVIL ACTION FILE
AMERICUS C. MITCHELL, JR.,) NO. 2:06CV3-B
Defendant.)

Deposition of DAVID L. SMOOT, taken by
counsel for Defendant, pursuant to agreement,
under the Federal Rules of Civil Procedure,
and reported by Grace F. Lengmueller, RPR,
held in the offices of Georgia Southwestern
Railroad, Inc., 78 Pulpwood Road, Dawson,
Georgia, on August 25th, 2006, commencing at
12:05 p.m.

ACCREDITED COURT REPORTERS
Post Office Box 1701
Columbus, Georgia 31902
(706) 323-3640
(800) 662-2741

DAVID L. SMOOT,

having been produced and first duly sworn

as a witness, testified as follows:

EXAMINATION

BY MR. ALLRED:

Q Could you state your name for us, please,
sir.

A David L. Smoot.

Q And you are part owner of the Georgia
Southwest Railroad; is that correct?

A That's correct.

Q And what percentage shareholder are you?

A 49 percent.

Q 49? Okay. And how long have you been with
the company?

A Since its charter, which was -- or since we
purchased it in 2002.

Q Okay. And what is your position with the
company?

A Corporately, I'm the secretary/treasurer, and
I'm also vice president.

Q Okay. And what are your duties with the
company?

A My primary responsibility is I handle all of
our real estate matters; I handle contracts with our

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

ADRIAN D. JOHNSON
Attorney at Law
Parnell & Crum, P.A.
641 South Lawrence Street
Post Office Box 2189
Montgomery, Alabama 36102
(334) 832-4200

FOR THE DEFENDANT:

D. CRAIG ALLRED
Attorney at Law
David E. Allred, P.C.
7030 Fain Park Drive
Suite 9
Post Office Box 241594
Montgomery, Alabama 36124
(334) 396-9200

I N D E X

	PAGE
OPENING REMARKS AND STIPULATIONS	3
EXAMINATION:	
By Mr. Allred	3
CERTIFICATE	10

various customers; I handle the tax records and things
of that nature, the guardian of personnel records; and
then I also do the freight accounting, oversee the
freight accounting.

Q Okay. So you'd be in charge of securing
right-of-ways and easements for the use of the railroad
company?

A We general -- if we were going to do
something like that, I would work with an attorney to
do it, but generally, my main function is when people
come to us and want an easement --

Q Sure.

A -- or our right-of-way.

Q Okay. I discussed this earlier with
Mr. Small a little bit, and I'll -- I was wondering if
you could give me some more details on it. He told me
that there's a contract between you, this company, and
Rail-Tex for the use of the railway where the White Oak
Spur is. Could you tell me a little bit about that
lease, the lease contract that you have for the use of
the White Oak Spur.

A I'm -- there's no contract between us and
Rail-Tex.

Q Okay. Who is the contract between?

A It would be us and Norfolk Southern

1 Corporation.
2 Q Okay. And what are the terms of that
3 contract?
4 A Well, that's -- it's a pretty thick document.
5 Basically, the terms are that we provide the switching
6 service on the line segment, and they can adopt the
7 stations as if they were their own for rate-making
8 purposes. And we will handle all of the switching for
9 the local customers and then take the cars back to the
10 railroad interchange to either Norfolk Southern or to
11 CSX Transportation.
12 Q Okay. And under the terms of that contract,
13 who's responsible for the maintenance of the --
14 A Georgia Southwestern Railroad would be
15 responsible for the maintenance.
16 Q Okay. And what's the -- what are the time --
17 terms as far as the time on the lease?
18 A The initial lease was a 20-year document.
19 Q Okay.
20 A With certain renewal provisions. I don't
21 recall those.
22 Q Okay. Do you know when it was signed
23 originally?
24 A No. I don't know the original date.
25 Q Okay. Do you know about how much longer you

5

1 repairs have been begun?
2 A No, I have not.
3 Q Okay. And do you know if they've been
4 completed?
5 A Well, I don't have personal knowledge that
6 they were completed, but the contractor billed us.
7 Q And what are the costs of the invoices that
8 have been sent to you so far?
9 A I don't have them memorized.
10 Q Okay. Is there any way you could get that
11 information to us? Let us know what you've paid?
12 A Yeah. I'm sure that we can.
13 Q Okay. Do you have any estimation as what the
14 value was of the trestle before the fire?
15 A I don't. I personally do not know that
16 value, no.
17 Q Okay. So you'd have to speculate to put a
18 value --
19 A Yeah. I'd have to find an expert that would
20 tell me what that trestle would be worth.
21 Q Okay. And it was my understanding from
22 Mr. Small and Mr. Eggers that the repairs on the
23 trestle began in fall of '05. Does that sound about
24 right to you?
25 A Well, I don't know. I don't recall the exact

7

1 have?
2 A Since that time, we've exercised an option to
3 purchase that line segment from the Norfolk Southern
4 Corporation.
5 Q Okay. Have you already purchased that line?
6 A No. It's an ongoing -- it's in process right
7 now.
8 Q Okay. So will that be completed in the next
9 year? Two years?
10 A We believe it will be completed in the next
11 few months.
12 Q Okay. As far as the trestle goes, the
13 trestle that we're here on today, are you familiar with
14 the repairs that have been done on the trestle?
15 A I'm familiar enough to say that the repairs
16 were done to the trestle.
17 Q Okay. To your understanding, what's been
18 done to the trestle?
19 A Just in general, I -- there was an invoice
20 that was generated from our contractor, and I believe I
21 had sent that on to Mr. Mitchell.
22 Q Uh-huh. You did.
23 A I didn't go into the detail about what they
24 did.
25 Q Okay. And have you been there since the

6

1 dates. I mean, if they both testified that way, I'm
2 sure that was --
3 Q Okay. Well, if they did begin in the fall of
4 '05, can you think of any reason why they should not
5 have begun closer in proximity to the time of the fire?
6 A No. I don't -- I mean, my understanding was
7 that the repairs that were made were because of the
8 fire, so I don't believe it was repairs scheduled to be
9 made prior to that.
10 Q No. I mean, between the time of the fire in
11 the fall of '05, is there any reason that you know of
12 that the repairs weren't begun, say, in March of '05?
13 A No. Only with the schedule of our
14 contractor.
15 Q Okay. Since the Louisiana Pacific Company
16 ceased its operations, what -- to what extent has the
17 track been used, that you know of? The White Oak Spur.
18 A There was a couple of movements of machinery
19 out of the plant that were sold that came off of there,
20 and then beyond that, we have had some railcars pushed
21 out there onto that track segment being held.
22 Q Okay. So basically, the -- moving that
23 equipment and the storage of railcars is the only thing
24 it's been used for?
25 A To my knowledge, that's all we used it for.

8

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GEORGIA SOUTHWESTERN RAILROAD,)
INC., a Corporation,)

Plaintiff,)

vs.)

AMERICUS C. MITCHELL, JR.,)

Defendant.)

CIVIL ACTION FILE

NO. 2:06CV3-B

Deposition of TERRY R. SMALL, taken by
counsel for Defendant, pursuant to agreement,
under the Federal Rules of Civil Procedure,
and reported by Grace F. Lengmueller, RPR,
held in the offices of Georgia Southwestern
Railroad, Inc., 78 Pulpwood Road, Dawson,
Georgia, on August 25th, 2006, commencing at
9:16 a.m.

ACCREDITED COURT REPORTERS
Post Office Box 1701
Columbus, Georgia 31902
(706) 323-3640
(800) 662-2741

MR. ALLRED: We're going to have
the usual stipulations with -- he and I
have agreed that this will be admissible
in an Alabama court since you're a
Georgia court reporter, and we've
already agreed to that prior to the
deposition.

TERRY R. SMALL,

having been produced and first duly sworn
as a witness, testified as follows:

EXAMINATION

BY MR. ALLRED:

Q Mr. Small, I'm Craig Allred here for Americus
Mitchell, the defendant in this case. I'm just going
to ask you a few questions here. If at any time you --
if I'm not clear on the question or you don't
understand the question, just let me know. I'll be glad
to repeat it for you. Or if you'd like to talk to
Adrian at any time, just let me know, and we can pause
for a minute, and y'all can go out in the hall.

Would you please state your name for us one
more time.

A Terry Ray Small.

Q Okay. And you're an employee of the Georgia
Southwest Railroad?

3

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

ADRIAN D. JOHNSON
Attorney at Law
Parnell & Crum, P.A.
641 South Lawrence Street
Post Office Box 2189
Montgomery, Alabama 36102
(334) 832-4200

FOR THE DEFENDANT:

D. CRAIG ALLRED
Attorney at Law
David E. Allred, P.C.
7030 Fain Park Drive
Suite 9
Post Office Box 241594
Montgomery, Alabama 36124
(334) 396-9200

ALSO PRESENT: Terry B. Eggers
Jason S. Revalee

I N D E X

PAGE

OPENING REMARKS AND STIPULATIONS ----- 3

EXAMINATION:

By Mr. Allred ----- 3
By Mr. Johnson ----- 49

CERTIFICATE ----- 59

EXHIBITS:

Defendant's Exhibit Number 1 ----- 34
Plaintiff's Exhibit Number 1 ----- 49
Plaintiff's Exhibit Number 2 ----- 49
Plaintiff's Exhibit Number 3 ----- 52
Plaintiff's Exhibit Number 4 ----- 52

2

A Yes.
Q Do you own the company?
A Majority, yes.
Q Okay. What's the general corporate structure
of the company?
A It's privately held; myself and one other
shareholder.
Q Okay. And who's that other shareholder?
A David L. Smoot.
Q Okay. And if you would, tell me a little bit
about what type of railroad this is.
A This is a short-line railroad that
basically -- we operate from Greenville, Georgia, to
Bainbridge, Georgia; Smithville to White Oak, Alabama,
into Eufaula.
Q Okay. So just in the states of Georgia and
Alabama?
A Yes.
Q Okay. And it's a Georgia corporation; is
that --
A No. Delaware --
Q A Delaware --
A -- corporation.
Q -- corporation?
A Yes. Yes.

4

1 Q Okay. What -- what types of freight do you
2 haul?
3 A Of course, a wide variety, but the majority
4 being peanut and peanut by-products, clay pellets and
5 aggregate, and then -- a lot of other stuff, smaller
6 volume, and hazardous materials, plastics, wood, ag
7 products; you know, grain, corn, wheat.
8 Q Okay. What would you consider to be the
9 railroad's primary market? Like what -- who do you try
10 to get business from?
11 A It's more a regional thing. Wherever your
12 footprint is you try to get business from anybody
13 that's going to have a bulk commodity that will ship.
14 Q Okay.
15 A So it's not a commodity group as much as a
16 territorial thing. Railroads, you're limited to
17 operating on your footprint, so anyone that would ship
18 or receive a bulk commodity within our footprint.
19 Q Okay. Who are some of your representative
20 clients?
21 A Are you asking who our customers are?
22 Q Yes.
23 A Golden Peanut would be one of the larger
24 ones.
25 Q Are they here in Georgia?

5

1 there.
2 Q Okay. How about the maintenance of the track
3 from the time that it was built until now?
4 A The -- well, from the time it was built, you
5 know, we could not speak on that.
6 Q Okay.
7 A But in terms of, you know, the last, you
8 know, five or six years, then, of course --
9 Q Okay.
10 A -- within that.
11 Q Let me ask you: How long has Georgia
12 Southwest Railroad owned that particular track?
13 A Well, technically, Georgia Southwestern does
14 not own that piece of track.
15 Q Okay. Who owns it?
16 A The Georgia Southwest Corporation, who then,
17 in turn, leases it to the Norfolk Southern.
18 Q Okay.
19 A Who then, in turn, leases it to the Georgia
20 Southwestern Railroad, who then we have the maintenance
21 responsibility.
22 Q Okay. So explain that to me one more time.
23 Who actually owns it?
24 A Georgia Southwest Corporation.
25 Q Okay. Who are they? Are they affiliated

7

1 A Yes.
2 Q Okay.
3 A And Alabama. Carbo (phonetic) Ceramics in
4 Eufaula to Cinderlo Curly (phonetic); they're bulk in
5 materials that are primarily -- I mean, they're on the
6 Georgia side, but -- and then we get into, you know, a
7 lot smaller ones.
8 Q Okay. And is this a Class I railroad?
9 A No.
10 Q What classification --
11 A Class III.
12 Q Class III? Okay. And generally, what does
13 that mean?
14 A That we have less than \$22 million of gross
15 revenue annually.
16 Q Okay. And just a few general questions about
17 who's going to be the most knowledgeable about what
18 areas. And Adrian's already given me some information
19 on this, but who would know the most about the use of
20 the track prior to the incident that we're here on
21 today?
22 A As far as use, it -- really, any -- myself,
23 Dave, or Jason.
24 Q Okay.
25 A And Terry would know what usage had been out

6

1 with y'all?
2 A No. And they're one of the -- they're one of
3 the companies involved with Norfolk Southern.
4 Q Okay. So that's a --
5 A For practical purposes, Norfolk Southern
6 Companies own it and lease it to the Georgia
7 Southwestern Railroad, Inc.
8 Q Okay. So basically, y'all are responsible
9 for the maintenance of the --
10 A Yes.
11 Q -- railway?
12 A Yes.
13 Q Okay. Is that part of your lease
14 agreement --
15 A Yes.
16 Q -- with them?
17 Do you have a written lease with them?
18 A Yes.
19 Q Okay. What are the general terms of that
20 lease?
21 A In regards to what?
22 Q Use, maintenance, how long the lease is, what
23 it's for, what the lease is for.
24 A The lease is for the purpose of the Georgia
25 Southwestern Railroad Company to provide common carrier

8

1 service on the line. And as far as the lease, it's a
 2 lease with purchase to -- an option to purchase and
 3 kind of evergreen in that nature as far as the lease.
 4 Q Okay.
 5 A And as far as the, you know, maintenance and
 6 paying property tax and everything, that falls to us,
 7 the Georgia Southwestern Railroad.
 8 Q Okay. And what specifically does it say with
 9 regard to maintenance that the Georgia Southwest
 10 Railroad is responsible for?
 11 A Specifically, you know, I can't quote it
 12 verbatim.
 13 Q Oh, I'm not asking word for word. I'm just
 14 saying generally; what it is you have to do.
 15 A We're responsible for all the maintenance,
 16 whether it's incidental or capital.
 17 Q So that would be things like replacing
 18 crossties and that sort of thing?
 19 A Yes.
 20 Q Okay. Like if you go along and you see one
 21 crosstie that looks like it's rotten, that's part of
 22 the lease, you're supposed to replace it?
 23 A No.
 24 Q What sort of thing would you do to conform
 25 with the maintenance part of the lease?

9

1 about the history of the railroad; of this particular
 2 company. When did y'all start?
 3 A The actual Georgia Southwestern Railroad,
 4 Inc., was incorporated -- I can't recall whether it was
 5 '94 or '96, which was owned by -- it was a subsidiary
 6 of Rail-Tex of San Antonio, who originally leased this
 7 line in '88 under the name of Georgia & Alabama
 8 Railroad. But they put it together with three other
 9 properties in Georgia around '94 or '96 to create the
 10 Georgia Southwestern Railroad, Inc.
 11 Q Okay. And you said Rail-Tex?
 12 A Rail-Tex.
 13 Q How do you spell that?
 14 A R-A-I-L-T-E-X.
 15 Q Okay.
 16 A And then they incorporated their three
 17 Georgia holdings into the Georgia Southwestern
 18 Railroad, Inc., around '94 or '96. And then in
 19 February of 2000, Rail-Tex was purchased -- the holding
 20 company was purchased by another holding company, which
 21 was Rail-America, out of Boca Raton, Florida, who then,
 22 in turn, sold the corporation -- or the shares of the
 23 corporation to myself and Dave Smoot in March of 2002.
 24 Q Okay. When y'all formed the corporation, did
 25 you sign a lease to use the White Oak Spur at that

11

1 A Actually, we would maintain this railroad to
 2 a FRA standard of Class II.
 3 Q Okay. What does that mean, exactly? I'm not
 4 familiar with that.
 5 A The FRA, Federal Railroad Administration, has
 6 a book of regulations, you know, for a lot of things
 7 more than railroads, but there's a particular set of
 8 track standards.
 9 Q Okay.
 10 A And within that track standard, they have a
 11 set of guidelines, such as your tie question. There's
 12 a minimum number of good ties evenly distributed over a
 13 39-foot rail length, which -- and that's just one
 14 example that related to your question.
 15 Q Okay. So is it more of a subjective
 16 standard? You don't just -- you know, you're walking
 17 or riding down the railroad on a maintenance car or
 18 whatever, and you see --
 19 A No. It's objective.
 20 Q Okay. So there's no set standard where, if
 21 there's a part of a certain piece of the crosstie
 22 missing, then that means you got to replace it or -- no
 23 set standard like that? It's just a general --
 24 A No. It's objective.
 25 Q Okay. If you would, tell me a little bit

10

1 time? Was that -- well, let me back up.
 2 The lease that you have with -- who did you
 3 say the lease was through that you --
 4 A Norfolk --
 5 Q Norfolk Southern?
 6 A Norfolk Southern.
 7 Q When you incorporated, at the same time, did
 8 you sign the lease with Norfolk Southern to use that
 9 particular spur, or was that later?
 10 A It was -- which corporation? You said when
 11 it was incorporated.
 12 Q Georgia Southwest Railroad. When -- you said
 13 you incorporated in '94 or '96?
 14 A The lease was signed in '88.
 15 Q Okay. So you basically inherited that lease?
 16 A It was owned by Rail-Tex, and they combined
 17 the Georgia & Alabama with two other properties.
 18 Q Okay.
 19 A So they put their holdings together under one
 20 corporate umbrella.
 21 Q Okay. And who was responsible for the
 22 maintenance of the track prior to your becoming
 23 incorporated, and by virtue of that, inheriting the
 24 lease through Rail-Tex, if you know?
 25 A I don't understand. What do you mean

12

1 him covering the damages, and he -- he admitted to
2 doing the fire and that, basically, he was not willing
3 to pay for it because of, you know, the quality of our
4 house -- if you would call it that -- didn't meet his
5 standards.

6 Q The quality of your what now?

7 A Property. Well, I was using an analogy as a
8 house -- the house being the bridge -- didn't meet his
9 standard; therefore, it was okay to burn it down, which
10 I don't think it's okay to burn your neighbor's house
11 down under any circumstance, but -- and that he would
12 contest -- you know, obviously, the meaning or the
13 paraphrase that I went away from the phone conversation
14 was that he was not going to take care of this matter
15 amicably.

16 Q Okay. Did he ever say, "This was my fault"?

17 A As I said, not having notes or a recording of
18 that, he did say it was his fire.

19 Q Okay. But did he say it was his fault that
20 the bridge burned?

21 A He said that he was doing a controlled burn
22 and that it got beyond his property boundary.

23 Q Okay. But did he ever say, "It's my fault
24 that the bridge itself burned"?

25 A Just by my definition of saying he left the

45

1 A The time frame that I can speak on, which
2 would have been, say, '99 when I was general manager to
3 the 2002, the amount being spent -- it would really
4 only be different by the number of inspections that
5 ended up to be required. There had been a track
6 project prior to my coming by Rail-Tex, which I don't
7 know the full amount of that tie and surface. I
8 believe it was sometime post flood, and so there was
9 only incidental track maintenance required because
10 there had been a track project by the parent company.

11 Q Okay.

12 A And so it had been sufficiently -- the rehab
13 project had been sufficient, not to require very much
14 incidental maintenance. And then the other routine
15 thing, the annual spraying, would have been the same,
16 whether they were shipping or not shipping.

17 Q Okay.

18 A The brush cutting program would have been the
19 same as any other line segment that we operate on. So
20 those two things would have been constant. The number
21 of track inspections, the time would have been the only
22 thing that would have varied.

23 Q Okay. Did you get an estimate for the repair
24 of the track from anyone other than Mr. Lindsey?

25 A You mean the trestle?

47

1 boundary -- the fire go beyond his boundary, and it was
2 the fire that burned the bridge, he was admitting
3 fault.

4 Q No, sir. That's not what I'm saying. I'm
5 saying: Did he ever tell you that this bridge burned
6 because that it was my -- actually my fault? Did he
7 say that it was my fault that the bridge burned? Not
8 just that the fire got away from him. Did he say the
9 bridge burned through my fault?

10 A He said that it was his fire that burned the
11 bridge.

12 Q Okay. Would you say that there was more or
13 less maintenance done on the track after the time that
14 Louisiana Pacific stopped their operations?

15 A Would you restate. Be more specific. As
16 compared to when?

17 Q Okay. From -- I believe you said they ceased
18 operations in 2002.

19 A Yeah. I didn't recall the exact date. I
20 believe it was the end of '02.

21 Q Well, from whatever time it was that they
22 ceased their operations to the time of this fire, do
23 you think that you spent more or less money on
24 maintenance than the time period prior to Louisiana
25 Pacific going out of business?

46

1 Q Uh-huh.

2 A No.

3 Q You didn't shop around or anything? See who
4 was the cheapest one? You just went with the first one
5 you got?

6 A I went with our bridge contractor.

7 Q Okay. So you've got a contract with
8 Mr. Lindsey on an ongoing basis?

9 A We have a service contract with him, yes.

10 Q Okay. What are the terms of that contract?

11 A It's -- it's not exclusive.

12 Q So you were -- I'm sorry. Go ahead.

13 A No. I mean, it's a con -- any contractor
14 that does work on our property, we have a service
15 contract. It doesn't mean that it's exclusive. We may
16 have -- say like with car repair, we may have multiple
17 companies that we have service contracts with.

18 Q So you were free to go get other price quotes
19 on the repair of the trestle if you wanted to?

20 A Sure.

21 MR. ALLRED: Okay. Y'all, if I
22 could have just a minute to look through
23 these documents that I was just
24 produced, I think I'm done, unless I
25 have any questions on these. So if we

48

1 want to just go off the record for a
 2 minute, and I'll look through these.
 3 MR. JOHNSON: That's fine.
 4 (Brief recess)
 5 MR. ALLRED: I'm done with you.
 6 MR. JOHNSON: Let me ask you a few
 7 questions -- back on the record -- to
 8 add a few follow-up questions to the
 9 questions that Craig has asked.
 10 Specifically, I want to mark as
 11 Plaintiff's Exhibits 1 and 2.
 12 (Whereupon, Plaintiff's Exhibit Numbers 1 and 2
 13 were marked for identification.)
 14 EXAMINATION
 15 BY MR. JOHNSON:
 16 Q I'd like you to refer to Plaintiff's Exhibits
 17 1 and 2 in reference to the weigh bills that we
 18 discussed earlier. And this was for equipment that was
 19 moved along that spur line in 2003; is that correct?
 20 A Yes.
 21 Q Okay. Could you explain exactly what the
 22 equipment was and why it was being used?
 23 A It's -- it was equipment that came out of the
 24 former Louisiana Pacific plant. They had two
 25 production lines. This represents the presses at one

49

1 Q Okay. And in order for these various cars to
 2 move along that line, is it essential that the line be
 3 in an operable capacity at the time that this freight
 4 is moved along the spur line?
 5 A Yes.
 6 Q And specifically, is it essential that the
 7 trestle be in an operable capacity in order to maintain
 8 this weighed load?
 9 A Yes.
 10 Q Other than moving this freight along that
 11 spur line, were there other instances after January of
 12 2004, which the last car appears to have moved along
 13 that line, were there other instances where cars were
 14 moved along that line between January of 2004 and
 15 February of 2005?
 16 A Yes. Best I can recall, we had some storage
 17 movements out there.
 18 Q Okay. When a line is being maintained --
 19 say, a brush cutting operation or a spraying
 20 operation -- are cars running along that line in those
 21 capacities?
 22 A The spraying is done by a high-rail vehicle;
 23 high rail meaning a vehicle that has wheels that can
 24 operate over the rail line. And spraying is usually
 25 done by high-rail truck, and brush cutting is done by a

51

1 of the production lines where the plant was being
 2 dismantled, and its future was up in the air at that
 3 point in time.
 4 Q And prior to this equipment being moved, was
 5 there an inspection done of that spur line?
 6 A Yes. Yeah. At any time that you have a line
 7 for whatever purpose had been deemed out of service,
 8 then you -- prior to the movement, you're required to
 9 have a track inspection.
 10 Q Okay. To your knowledge, was the track
 11 inspection performed prior to moving this equipment on
 12 that line?
 13 A Yes.
 14 Q And pursuant to the documents here, it
 15 indicates that that was moved on December 16th, 2003.
 16 To your knowledge, would that have been the date that
 17 the equipment was actually moved along the line?
 18 A The attached page has the actual days that
 19 the equipment moved.
 20 Q Okay.
 21 A And so looking at those pages, the empty --
 22 the empty flatcar would have moved out on December the
 23 9th of '03. Then the load was released for shipment on
 24 the 16th. And then it looks like it probably moved on
 25 the 17th.

50

1 high-rail machine; could be a truck or an
 2 excavator-looking type of machine, but it would operate
 3 on the rails as well.
 4 Q So in order to have a brush cutting or a
 5 spraying or a high-rail vehicle is used, is it
 6 essential that the track be maintained in an operable
 7 capacity?
 8 A Yes.
 9 Q Okay. Would it be essential that this
 10 specific trestle be maintained in an operable capacity
 11 in order to maintain the spraying and the cutting of
 12 that line?
 13 A Yes.
 14 Q To your knowledge, was that line -- the White
 15 Oak Spur line either brush cut or sprayed during the
 16 calendar year 2004?
 17 A Yes.
 18 MR. JOHNSON: Can I get Plaintiff's
 19 3 and 4.
 20 (Whereupon, Plaintiff's Exhibit Numbers 3 and 4
 21 were marked for identification.)
 22 BY MR. JOHNSON:
 23 Q Terry, I'm going to show you what I'm marking
 24 as Plaintiff's Exhibit 3. Can you explain what that
 25 invoice is.

52

1 A It's an invoice from Utilco, Incorporated,
2 and they provided brush cutting services on the segment
3 from Eufaula to the end of track; former Louisiana
4 Pacific property.
5 Q Would that include the right-of-way adjacent
6 to the trestle that we're here about today?
7 A Yes.
8 Q And exactly what is entailed in a brush
9 cutting to maintain the right-of-way?
10 A It's a -- their equipment has a large arm
11 that has a mowing head capable of mowing down trees up
12 to a certain diameter, and it's probably -- its head is
13 probably 8 to 10 feet wide. And in this case, I
14 happened to recall they made three passes on each side
15 of the rail.
16 Q Is that unusual?
17 A It's not unusual. On this line where we did
18 not have the active chipper on the end, we were just
19 going to do one pass, and they did three passes on
20 either side.
21 Q Okay. And in doing three passes, they went
22 above and beyond what you had anticipated needing just
23 to maintain the right-of-way; is that correct?
24 A Yes. Well, more than what we would have
25 probably decided for that level of business.

53

1 A To my knowledge, yes.
2 Q In spraying the White Oak Spur line, would
3 that also include the trestle that we're talking about
4 here today?
5 A Yes.
6 Q Do you know when -- the dates reflected here,
7 to your knowledge, are the dates reflected on the
8 invoice was accurate as to when the spraying was
9 performed?
10 A The specific dates of when it was performed
11 are probably not on the invoice, but for that calendar
12 year, yes.
13 Q Okay. And to your knowledge, was it sprayed
14 at least twice during the calendar year or possibly
15 three times during the calendar year of 2004?
16 A As best I could recall, yeah; at least twice.
17 And that's what we were invoiced, and that's what we
18 paid for them.
19 Q Is that customary to spray approximately once
20 or twice per year on each line?
21 A It's -- it wasn't Georgia Southwestern.
22 We -- we've sprayed at least twice each year. We --
23 you know, it stays green down here about year-round, so
24 you have to do it at least twice.
25 Q Okay. And is this your normal operating pass

55

1 Q Okay. I'm going to show you what I'm marking
2 collectively as Plaintiff's Exhibit 4, which is a
3 series of four invoices -- or excuse me -- five
4 invoices from NaturChem. Can you explain who NaturChem
5 is.
6 A NaturChem is a -- NaturChem West,
7 Incorporated, out of Conyers, Georgia, is a company
8 that we trade with -- and have for a number of years --
9 that does our spraying. And so they spray, and that's
10 for vegetative control over the line segment. And the
11 miles where the bridge was was included in that
12 spraying. And -- and so they're the contractor that
13 would have sprayed that, and it required or normally
14 requires at least two applications and then incidental
15 follow-up.
16 Q When NaturChem sprays more of your lines --
17 in particularly, the White Oak Spur line -- is it just
18 the track, or is it any portion of the right-of-way of
19 the track?
20 A It -- you can trade or contract for varying
21 widths. Tell you, at a minimum, you know, we're going
22 to do 12-foot wide from the center of track, which is
23 sufficient, but we always contract for a 24-foot wide.
24 Q And to your knowledge, did they spray 24-foot
25 wide on the White Oak Spur line?

54

1 that you would maintain the spraying each year as well
2 as a brush cutter each year on particular lines?
3 A We do the spraying each year. The brush
4 cutting is -- it's more variable depending on the line
5 segment. I would say typically brush cutting every
6 three to five years; or some segments, not at all, you
7 know, depending on conditions. You know, like if -- we
8 have other segments that go out along grain fields and
9 stuff that don't require brush cutting, so it --
10 there's not a standard, per se, for every line being
11 treated the same.
12 Q Okay. Going along that same line, would you
13 say, then, that on this White Oak Spur line, purely in
14 terms of vegetative control, that you did more in the
15 2004 calendar year than you would on an average basis
16 for a lot of the lines that you maintained?
17 A Yes. Because of the brush cutting, that was
18 more -- we did not brush cut nowhere near a hundred
19 percent of the rest of the railroad. That one we did,
20 and it -- from the time the plant closed -- from the
21 time Louisiana Pacific closed, numerous times I went
22 out there with city and county governments of Eufaula,
23 Barbour County, to try to help get a new suitor in and
24 restart the plant. And so there was different levels
25 of optimism throughout that time period.

56

1 We always believed that someone eventually
2 would reopen the plant, and so we kept that going. And
3 we knew that there was going to be some shipments of
4 equipment in and out, and the reason, really, for the
5 wider brush cutting out there was not so much, you
6 know, what's required for the track but just to assure
7 that there -- you know, the presses or something would
8 not have been brushed along the side of them.

9 Q Okay. And because you were continuing to
10 negotiate with potential customers that were going to
11 utilize that spur line, was it essential that you
12 maintain that spur line in an operable capacity?

13 A Yes.

14 Q And prior to the fire that we're here about
15 today, was that line maintained in an operable
16 capacity?

17 A Yes.

18 Q Just one or two other questions.

19 To your knowledge, has Georgia Southwestern
20 Railroad ever given authorization to an adjacent
21 property owner to utilize the railroad as a firebreak
22 or as some other means of controlling a fire?

23 A No, sir.

24 Q Okay. Is it standard practice of the
25 railroad if a adjoining landowner is doing a controlled

57

C E R T I F I C A T E

G E O R G I A:

MUSCOGEE COUNTY:

I hereby certify that the foregoing transcript was taken down, as stated in the caption, and the questions and answers thereto were reduced to typewriting under my direction; that the foregoing Pages 3 through 58 represent a true, complete, and correct transcript of the evidence given upon said hearing; that I am not a relative, employee, attorney, or counsel for any of said parties in the case; that I have no financial interest in the action.

Before the deposition began and pursuant to Article 8.B of the Rules and Regulations of the Board of Court Reporting of the Judicial Council of Georgia, I made the following disclosure:

I am a Georgia Certified Court Reporter. I am here as a representative of Accredited Court Reporters (ACR). ACR was contacted by the offices of Defendant's Counsel to provide court reporting services for this deposition. ACR will not be taking this deposition under any contract that is prohibited by O.C.G.A. 15-14-37(a) and (b).

This, the 28th day of August, 2006.

Grace F. Lengmueller, B-2132
Registered Professional Reporter

59

1 burn that they maintain their own firebreaks rather
2 than utilizing the railroad as a firebreak?

3 A Yes. That they -- yeah. We in no way,
4 shape, or form would, you know, give permission to
5 utilize right-of-way. And the other locations people,
6 you know, at -- you know, the plowed-up section or
7 whatever has a firebreak alongside of our right-of-way.

8 Q Okay. To your knowledge, was there a
9 separate firebreak constructed in this location, the
10 White Oak Spur line, by Mr. Mitchell or somebody else
11 associated with Mr. Mitchell?

12 A Not to my knowledge, no.

13 MR. JOHNSON: Okay. I think that's
14 all I have.

15 MR. ALLRED: I'm going to have to
16 object to the form of that question.
17 Didn't get it in there in time, but --

18 MR. JOHNSON: You got to jump in
19 there.

20 MR. ALLRED: I know.

21 MR. JOHNSON: Got to be quick.

22 So is that all you have?

23 MR. ALLRED: That's all I have.

24 (Deposition concluded at 11:07 a.m.)

25

58